

On appeal the issues to be considered are:

- (1) Whether Kansas has jurisdiction of this claim, and more specifically, whether the injury occurred in Kansas or claimant's contract of employment was entered into in Kansas;
- (2) Nature and extent of claimant's disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the arguments of the parties, the Appeals Board finds:

- (1) Claimant's contract of employment was entered into in Kansas and the Kansas Workers Compensation Act does apply. K.S.A. 44-506.

Claimant testified at both the Preliminary Hearing and the Regular Hearing regarding how he was hired by the respondent, Mack Truck Sales. At the Preliminary Hearing he testified that Jim Wilson, then working at Mack Truck Sales in Missouri, called him at Feld Chevrolet Truck Leasing, also in Missouri. Claimant gave a more specific description of the events in his Regular Hearing testimony. At the Regular Hearing he testified, as he had at the Preliminary Hearing, that Jim Wilson contacted the claimant at Feld Chevrolet in Missouri and offered him employment at Mack Truck Sales. Claimant testified that he told Jim Wilson that he would need to speak with his wife about the offer. Claimant then called from his home in Kansas City, Kansas and accepted the offer of employment. Respondent argues that the Preliminary Hearing testimony is inconsistent with the testimony given at the Regular Hearing. From our review of the testimony it appears, however, the testimony is not inconsistent. The Regular Hearing testimony fills in details not asked for in the questioning at the Preliminary Hearing.

Respondent also argues that, even if we accept claimant's testimony as true, the contract was not completed until claimant left his employment at Feld Chevrolet on the day after his telephone call from Kansas City, Kansas. According to respondent the agreement was not an enforceable one until claimant gave up his employment at Feld Chevrolet. The Appeals Board disagrees. The Appeals Board finds that the last act necessary to create the employment agreement was claimant's acceptance in Kansas. See Morrison v. Hurst Drilling Co., 212 Kan. 706, 512 P.2d 438 (1973). Although some contracts of employment might be enforceable for a term, most are terminable at will and legal enforceability cannot reasonably be the standard or test for determining when the contract was entered. The fact claimant resigned his employment with Feld Chevrolet on the day after he accepted by telephone provides convincing evidence that the parties had an agreement in the previous telephone conversations. The Appeals Board therefore finds that the last act necessary for the creation of claimant's employment contract with Mack Truck Sales was an act performed in Kansas and the Kansas Workers Compensation Act applies.

- (2) The Appeals Board also agrees with the finding by the Administrative Law Judge that claimant is entitled to benefits, first for thirty percent (30%) permanent partial impairment until the last day worked and thereafter for sixty-seven and one-half percent (67.5%) permanent partial disability to the body as a whole.

The parties stipulated the claimant's functional impairment was thirty percent (30%). The Appeals Board finds, based upon the testimony of Dr. Hood and claimant's description of the onset of symptoms, that claimant did suffer aggravation of the previous existing condition, causing additional impairment as a result of his work for the respondent. Based upon Dr. Hood's opinions, the Appeals Board also finds that the injuries rendered claimant unable to perform his previous work as a diesel mechanic and truck driver. Claimant has degenerative disc disease and an arthritic back at multi-levels. His injury was superimposed upon the pre-existing disc disease.

Stephen Sturdevant, Ph.D., gave the only expert opinion regarding the effect of claimant's injury on his access to the open labor market and his ability to earn a comparable wage. In Dr. Sturdevant's opinion, claimant has suffered a loss of access to the labor market of approximately eighty to ninety percent (80-90%). He also testified that he would expect claimant could earn approximately \$5 per hour post-injury. As noted by the Administrative Law Judge the \$5 per hour compared to the pre-injury wage claimant shows an approximate sixty percent (60%) loss of ability to earn a comparable wage. The Appeals Board finds that the opinion of Dr. Sturdevant regarding the loss of access should be adjusted to account for testimony given in his deposition indicating that the eighty to ninety percent (80-90%) loss assumed claimant would not be able to perform any light work. He admitted in the deposition that claimant likely would be able to perform some light category work. The Appeals Board therefore finds, as did the Administrative Law Judge, that claimant has a loss of access of seventy-five percent (75%). By giving equal weight to the loss of access and loss of ability to earn a comparable wage, the Appeals Board finds the claimant has a sixty-seven and one-half percent (67.5%) permanent partial disability of the body as a whole. The decision of the Administrative Law Judge relating to the nature and extent of the claimant's disability should be affirmed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Alvin E. Witwer, dated June 13, 1994, should be, and is hereby, affirmed.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE in favor of the claimant, Dale E. Brewer, and against the respondent, Kansas City Mack Sales & Service, Inc., and its insurance carrier, Fidelity & Casualty Co. of New York, for temporary total disability compensation and permanent partial disability compensation.

Claimant is entitled to 24.71 weeks of temporary total disability compensation at the weekly rate of \$256 and in the sum of \$6,325.76, plus .57 of a week of permanent partial disability compensation at the weekly rate of \$99.21, for a 30% permanent partial disability to the body as a whole in the sum of \$56.55, plus 389.72 weeks of permanent partial disability compensation at the weekly rate of \$223.22, for a 67.5% permanent partial disability to the body as a whole, and in the sum of \$86,993.30, making a total award of \$93,375.61.

As of March 31, 1995, there would be due and owing the claimant 24.71 weeks of temporary total disability compensation at the weekly rate of \$256 and in the sum of \$6,325.76, plus .57 of a week of permanent partial disability compensation at the weekly rate of \$99.21, and in the sum of \$56.55, plus 350.01 weeks of permanent partial disability

compensation at the weekly rate of \$223.22 and in the sum of \$78,129.23, making a total amount due and owing of \$84,511.54, to be paid in one lump sum.

Thereafter, the remaining compensation in the sum of \$8,864.07 is to be paid the claimant at the weekly rate of \$223.22 for 39.71 weeks until fully paid, or until further order of the Administrative Law Judge.

Claimant is entitled to future medical treatment, an unauthorized medical allowance in the sum of \$350, and reimbursement of certain medical and hospital expenses paid by the claimant, or any health insurance carrier, upon proper application to the Director.

Claimant is denied payment by the respondent and/or insurance carrier, of certain unauthorized medical expenses as directed in the original Award.

Claimant's attorney is granted a lien against the proceeds of this award of not more than 25% pursuant to K.S.A. 44-536.

All fees necessary to defray the expense of the administration of the Kansas Workers Compensation Act are assessed against the respondent-insurance carrier as follows:

Metropolitan Court Reporters, Inc.	\$655.20
Gene Dolginoff Associates, Ltd.	\$534.35

IT IS SO ORDERED.

Dated this ____ day of March, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Kenneth P. Seck, Overland Park, KS
Robert W. Harris, Kansas City, KS
Kip A. Kubin, Overland Park, KS
Alvin E. Witwer, Administrative Law Judge
George Gomez, Director